Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

S.W.S. ERECTORS, INC., d/b/a SOUTHWEST SIGNS,

Petitioner,

v.

TRIANGLE SIGN & SERVICE, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI OF S.W.S. ERECTORS, INC., d/b/a SOUTHWEST SIGNS

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QUESTIONS PRESENTED FOR REVIEW

QUESTION NO. 1: Whether Rule 49 of the Federal Rules of Civil Procedure permits the use of a single special verdict to ask two separate questions, when the answer to the two questions can clearly be different and the answers are based upon two separate theories of liability?

QUESTION NO. 2: Whether a judgment which is based upon irreconcilable special verdicts, in which one of the special verdicts is disregarded as surplusage, is in derogation of the Seventh Amendment right to trial by jury?

LISTING OF PARTIES

The parties to this proceeding are:

S.W.S. Erectors, Inc. d/b/a Southwest Signs
403 N. Loop E.
Houston, TX 77022, and

Triangle Sign & Service, Inc.
P. O. Box 24186
Baltimore, MD 21227.

There are no parent companies or non-wholly owned subsidiaries of S.W.S. Erectors, Inc.

There are no known parent companies or non-wholly owned subsidiaries of Triangle Sign & Service, Inc.

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OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

The opinion of the United States District Court for the Southern District of Texas is not reported. The opinion of the United States Court of Appeals for the Fifth Circuit is unreported. That opinion was unreported pursuant to Local Rule 47.5 of the United States Court of Appeals for the Fifth Circuit in case number 92-7658. There are no other opinions in this case.

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

This case seeks certiorari from a decision of the United States Court of Appeals for the Fifth Circuit. The opinion of that Court was entered on April 29, 1994. On May 13, 1994, a timely petition for rehearing was filed before the Court. That petition was denied on May 27, 1994. This petition is being filed within ninety days of that date.

It should be noted that this case originated in the United States District Court for the Southern District of Texas, case number 92-7658. Jurisdiction of that court was based upon diversity of citizenship between the parties and that the amount in controversy exceeded Fifty Thousand Dollars ($50,000.00), exclusive of interest and costs. Its jurisdiction was invoked under 28 U.S.C. § 1332.

Following the entry of judgment in the District Court, a notice of appeal was filed appealing the case to the United States Court of Appeals for the Fifth Circuit. That Court had jurisdiction pursuant to 28 U.S.C. § 1291.

Jurisdiction of this Court on the petition for certiorari is based on 28 U.S.C. § 2101 and upon Rule 10 of the Revised Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS AND RULES

Rule 49, Federal Rules of Civil Procedure.

(a) **Special Verdicts**. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or the evidence, each party waives the right to trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) **General Verdict Accompanied by Answers to Interrogatories**. The court may submit to the

jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

U.S. Const. Amend. VII:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury, shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

Triangle Sign & Service, Inc. ("Triangle") entered into a subcontract for S.W.S. Erectors, Inc. d/b/a Southwest Signs (hereinafter "Southwest Signs") to perform certain construction work at Intercontinental Airport in Houston, Texas. Certain work was performed by Southwest Signs under a written agreement, while other work was performed under an oral agreement for changes. The jury specifically found both an oral and a written contract.

After Triangle failed to pay sums that Southwest Signs contended were due under the contract, Southwest Signs brought the present action. Triangle admitted liability on the written contract, but contended that it was excused from performance because Southwest Signs had not supplied certain releases. Triangle admitted that it owed Seventeen Thousand One Hundred Fifteen Dollars ($17,115.00) on the written contract which would be paid as soon as Southwest Signs provided written releases. Triangle denied the existence of any oral agreement.

The basis for jurisdiction in the United States District Court was that the amount in controversy exceeded $50,000.00, exclusive of interest and costs, and that the parties were citizens of different states. That jurisdiction was based upon 28 U.S.C. § 1332.

The United States Court of Appeals for the Fifth Circuit had jurisdiction of the appeal because a timely notice of appeal to the court was filed. That jurisdiction was based upon 28 U.S.C. § 1291.

The judgment of the district court was based entirely on five special verdicts. The special verdict (interrogatories) are as follows:

> "Interrogatory No. 1: Do you find from a preponderance of the evidence that Defendant Triangle Signs & Services, Inc., failed to pay Plaintiff S.W.S. Erectors, Inc., doing business as Southwest Signs, in accordance with the May 4, 1990, subcontract agreement, including the accompanying plans and written change orders?
>
> Answer: No.
>
> Interrogatory No. 2: Do you find from a preponderance of the evidence that Defendant Triangle Signs & Services, Inc., agreed to pay for additional work which was not included in the May 4, 1990, subcontract agreement, et cetera, and which was done pursuant to additional oral change orders?
>
> Answer: Yes.
>
> Interrogatory No. 3: Do you find from a preponderance of the evidence that defendant failed to comply with the agreement by failing to pay plaintiff for the work performed on such additional oral change orders?
>
> Answer: Yes.
>
> Interrogatory No. 4: Do you find from a preponderance of the evidence that Defendant Triangle Signs & Services, Inc.'s failure, if any, to comply with the May 4, 1990, subcontract agreement, et cetera, and/or the oral agreement to pay for additional work are "excused"?
>
> Answer: Yes.

> Interrogatory No. 5: What sum of money, if any, if paid now in cash would fairly and reasonably compensate Plaintiff S.W.S. Erectors, Inc., for its damages, if any, that resulted from failure, if any, of Defendant Triangle Signs & Services, Inc., to pay S.W.S. Erectors, Inc., in accordance with the subcontract agreement, et cetera, and/or the oral agreement to pay for additional work?
>
> Answer: $23,031."

Based on these special verdicts, the district court entered judgment in favor of Triangle, finding that any breach of contract on Triangle's part was excused.

The judgment entered below was based primarily on the jury's response to interrogatory number four. That interrogatory inquired about the existence of the excuse defense on the claims for breach of both the written and the oral contract:

> "Do you find from a preponderance of the evidence that Defendant Triangle Signs & Services, Inc.'s failure, if any, to comply with the May 4, 1990, subcontract agreement, et cetera, and/or the oral agreement to pay for additional work are excused?"

Because the factual basis giving rise to the excuse defense was different as to the written and oral contracts,[1] Southwest Signs objected to the form of the interrogatory. The

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[1] As to the written contract, excuse for performance was based on failure to provide a final release. As to the oral contract, excuse for performance was based upon failure to provide written change orders, failure to perform in a good and workmanlike manner, and failure to timely bill.

objection was interposed because the jury was asked about defenses on two separate claims and was required to answer the interrogatory affirmatively if it found that a defense to either claim existed. Without the jury's answer to interrogatory four, judgment would have been entered in favor of Southwest Signs because interrogatories two and three found the existence of an oral agreement and damages were assessed in interrogatory five.

Special verdicts are intended to avoid confusion, appellate uncertainty, and additional proceedings. *Jamison Co., Inc. v. Westvaco Corp.*, 526 F.2d 922, 935 (5th Cir. 1976). In furthering this consideration, special verdicts should not be based on double, or alternative, questions.

> "An interrogatory encompassing two issues or issues in the alternative constitutes reversible error if the interrogatory is ambiguous or if one of the issues is incorrectly submitted to the jury."

Dougherty v. Continental Oil Co., 579 F.2d 954, 960 n.2 (5th Cir. 1978), *vacated on other grounds*, 591 F.2d 1206 (5th Cir. 1979), citing *Prudential Insurance Co. v. Morrow*, 339 F.2d 411 (5th Cir. 1964); *Landon v. National Building Corp.*, 415 F.2d 860 (6th Cir. 1969); *Scarborough v. Atlantic Coastal R.R.*, 190 F.2d 935 (4th Cir. 1951); *Seaboard Air Line R.R. v. Gill*, 227 F.2d 64 (4th Cir. 1955); see also *Dreiling v. General Electric Co.*, 511 F.2d 768, 774 (5th Cir. 1975) [ultimate questions of fact in interrogatories must be clearly submitted to the jury]; *Gootee v. Colt Industries, Inc.*, 712 F.2d 1057, 1066-67 (6th Cir. 1983) [interrogatory was misleading where it incorporated two theories of liability which were distinct].

Two of the three judges on the panel of the United States Court of Appeals for the Fifth Circuit, with one judge dissenting, found that the ambiguity in the interrogatory was cured by the jury's response to interrogatory one. In that interrogatory, the jury found Triangle had not "failed to pay" in accordance with the written contract. The panel found that this language was equivalent to finding that there was no breach of the written contract.[2] It reasoned that because no breach of the written contract was found that there could be no excuse for a breach.

However, interrogatory four inquired about excuse for "failure to comply" with the written and oral contracts, not about excuse for "breach of contract." The jury's response to the interrogatory must be read in conjunction with the instructions given to the jury. One instruction informed the jury that "failure to comply" is not a "breach of contract" if performance is excused:

> "As I have told you, ***the failure to comply with the term of an agreement is not a breach if compliance is excused*** based upon either of two defenses asserted by the defendant: One, failure to comply by Triangle Sign & Service, Inc., is excused by S.W.S. Erectors, Inc.'s previous failure to comply with a material obligation of the same agreement; and, two, failure to comply by

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[2] The majority opinion found that because the jury's response was equivalent to finding that no breach of the written contract occurred that the jury could not find that excuse for that breach was present in response to interrogatory four. Therefore, the jury's answer to interrogatory four could only refer to the oral contract.

> Triangle Sign & Service, Inc., is excused if compliance is waived by S.W.S. Erectors, Inc." [emphasis added]

In construing the jury's response to the interrogatory, it must be remembered that Triangle admitted owing $17,115.00 on the written contract, but contended that it was excused from performance based on Southwest Sign's failure to provide written releases. In response to interrogatory one, the jury found that Triangle had not failed to pay in accordance with the written contract. This response indicates that the jury absolutely believed the excuse defense offered by Triangle. After making this finding, the jury had no choice but to find in response to interrogatory four that the failure of Triangle to pay under the written contract was excused because Triangle admitted owing $17,115.00 under the written contract.

Fed. R. Civ. P. 49(a) provides, in part:

> "The court may require a jury to return only a special verdict in the form of *a special written finding upon each issue of fact.* * * * " [emphasis added]

This rule allows for "a special written finding upon each issue of fact." It does not authorize, and has never been construed as authorizing, a written finding upon two issues of fact. As noted by Judge Van Graafeiland in his dissenting opinion:

> " 'Care should be taken to avoid questions that combine two issues disjunctively because a 'yes' or 'no' answer may be construed as referring to either issue.' "

Court of Appeals Dissenting Opinion at 1, citing 9 Wright & Miller, *Federal Practice and Procedure*, § 2508. The dissenting opinion continued:

> "These interrogatories [four and five] are paradigmatic examples of the type of question that should not be asked. Triangle's attorney properly objected to their use, and his objection should have been upheld. The district court's failure to do so has resulted in a judgment that this dissenter is unable to justify rationally.
>
> * * *
>
> [W]e cannot say whether the jury, in responding to Interrogatory No. 4, found that Triangle's 'failure, if any, to comply with the May 4, 1990, Subcontract Agreement, etc., *and/or* the oral agreement to pay for additional work [was] "excused." ' . . . Likewise, we cannot say whether the jury, in responding to Interrogatory No. 5, awarded damages for Triangle's failure to pay Southwest 'in accordance with the Subcontract Agreement, etc., *and/or* the oral agreement to pay for additional work.' "

Interrogatory five asked the jury to assess "damages, if any, that resulted from failure, if any, of . . . Triangle Signs & Services, Inc., to pay . . . in accordance with the subcontract agreement . . . and/or the oral agreement." Prior to the time that the jury answered this interrogatory, the jury had been instructed that damages could only be awarded for the "breach of a binding agreement between the parties:"

> "If you determine that defendant breached the written subcontract agreement or that another agreement for work done on additional oral

> charge orders existed and that defendant breached that agreement or both, then you must determine the amount of damages that plaintiff has suffered as a result of defendant's breach.
>
> *In considering these damages, you may consider only those damages that plaintiff has proven by a preponderance of the evidence that it suffered as a result of defendant breach of a binding agreement between the parties.*" (emphasis added).

Triangle had contended that its performance under the contracts was excused. However, the instructions above told the jury that damages could only be awarded for the "breach of a binding agreement." The jury was also instructed that if the defense of excuse for performance was present that the failure of Triangle to perform was not a breach of contract:

> "If you determine that a binding agreement for additional work existed between the parties, you must then decide whether defendant breached that agreement.
>
> As I have told you, the failure to comply with the term of an agreement is not a breach if compliance is excused based upon either of two defenses asserted by the defendant: One, failure to comply by Triangle Sign & Service, Inc., is excused by S.W.S. Erectors, Inc.'s previous failure to comply with a material obligation of the same agreement; and, two, failure to comply by Triangle Sign & Service, Inc., is excused if compliance is waived by S.W.S. Erectors, Inc."
>
> These instructions informed the jury that:
>
> (1) damages could only be awarded for breach of contract; and

> (2) if excuse for performance under the contract was present, there was no breach of contract.

Therefore, damages could only be awarded for an unexcused nonperformance under the contract. It must be assumed that the jury followed the instructions given by the district court. Cf. *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 485, 53 S.Ct. 252, 255, 77 L.Ed. 439, 485 (1933); *Opper v. United States*, 348 U.S. 84, 95, 75 S.Ct. 1581, 99 L.Ed. 101, 110 (1954). Interrogatory responses must be read in conjunction with instructions given to the jury. *Winter v. Brenner Tank, Inc.*, 926 F.2d 468, 472 (5th Cir. 1991), citing *McVey v. Phillips Petroleum Co.*, 288 F.2d 53, 59 (5th Cir. 1961); *Concise Oil & Gas Partnership v. Louisiana Intrastate Gas Corp.*, 986 F.2d 1463, 1474 (5th Cir. 1993); *Dreiling v. General Electric Co.*, 511 F.2d 768, 774 (5th Cir. 1975).

Although the jury assessed "damages" in the amount of Twenty-Three Thousand Thirty-One Dollars ($23,031.00) in response to interrogatory number five, and although the jury was instructed that these damages could only be awarded for an unexcused failure to perform, the Court of Appeals determined that the amount of damages assessed by the jury was an appraisal of damages which were excused, and that the appraisal of damages was merely surplusage. This determination, however, overlooks the fact that the jury could have easily answered "$0.00" in response to the damages interrogatory if the damages were excused. The interrogatory itself invited the jury to find that no damages were present:

> "What sum of money, if any, . . . would fairly and reasonably compensate Plaintiff S.W.S. Erectors, Inc., for its **damages, if any** . . . ." [emphasis added]

To fail to give effect to the response to interrogatory five is to deny this party of the Seventh Amendment right to trial by jury, by denying the benefit of the jury's response to special interrogatory five. See *Garcia v. Murphy Pacific Marine Salvaging Co.*, 476 F.2d 303, 306 (5th Cir. 1973); *Dunn v. Sears, Roebuck & Co.*, 639 F.2d 1171, 1174-75, *modified on other grounds*, 645 F.2d 511 (5th Cir. 1981). In arriving at this conclusion, it should be remembered that U.S. Const. amend. VII provides, in part:

> "no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

Failing to give effect to the interrogatory response was clearly a re-examination of the facts found by the jury. A redetermination of the facts is clearly not authorized. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 358-59, 82 S.Ct. 780, 7 L.Ed.2d 798, 803 (1962).

Because the jury's finding of damages (which could, under the instructions, be awarded only if no excuse was present) would be in conflict with the jury's finding of excuse for breach of contract in a separate interrogatory (although that interrogatory is contended to be ambiguous), a new trial should have been ordered. See, e.g., *Brooks v. Brattleboro Memorial Hospital*, 958 F.2d 525, 529 (2d Cir. 1992); 5A *Moore's Federal Practice*, ¶ 49.03[4]. Because the jury's findings were not consistent (if interrogatory four found the existence of excuse for breach of

the oral contract), the findings cannot be used as a predicate for the entry of judgment. *Auwood v. Harry Brandt Booking Office, Inc.*, 850 F.2d 884, 890 (2d Cir. 1988).

REASONS FOR GRANTING CERTIORARI

While at first glance, this case may appear to be just another petition for certiorari from a diversity of citizenship case, the issues presented are of significant public interest to every litigant in a civil case in the United States District Courts. The case involves a judgment based entirely on special verdicts where both parties contest the effect of the jury's responses to the interrogatories.

The District Court utilized a single interrogatory which asked two separate questions of the jury. The two questions concerned two separate factual defenses in the underlying case. If the jury found the existence of either defense, it was required to answer the interrogatory in the affirmative. However, an affirmative answer to the interrogatory was a finding that both defenses were proven.

In addition, the jury was specifically instructed that damages could only be awarded for the breach of a contract. Instructions given to the jury defined a breach of contact as an unexcused failure to perform. When the jury returned a damage award in an interrogatory, the special verdict was disregarded as surplusage. The lower court found that the jury found the amount of damages that were awarded was excused, even though the instructions given to the jury specified otherwise.

The case would give the Court the opportunity to clarify the usage of special verdicts under Rule 49 of the Federal Rules of Civil Procedure. In light of the large numbers of appeals each year to the Circuit Courts of Appeal dealing with special verdicts, the case would clarify the usage of special verdicts.

The Court would also be given the opportunity to clarify when, and if, a jury's response to a special verdict can be disregarded as surplusage. This issue is of significant importance because of the Constitutional guarantee of trial by jury specified in the Seventh Amendment of the United States Constitution.

For the reasons specified above, the decisions of the lower courts significantly departed from the accepted and usual course of judicial proceedings. Petitioner requests this Court to grant the Petition for Certiorari and allow the matter to be submitted to the Court on the merits.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7658

S.W.S. ERECTORS, INC., d/b/a
SOUTHWEST SIGNS,

Plaintiff-Appellant
Cross-Appellee,

versus

TRIANGLE SIGN & SERVICE, INC.,

Defendant-Appellee
Cross-Appellant.

Appeals from the United States District Court
for the Southern District of Texas
(CA G 92 11)

(Filed April 29, 1994)

Before VAN GRAAFEILAND*, SMITH, and WIENER, Circuit Judges. WIENER, Circuit Judge:**

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* Circuit Judge of the Second Circuit, sitting by designation.

** Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Plaintiff-Appellant S.W.S. Erectors, Inc., d/b/a Southwest Signs (Southwest) appeals a take-nothing judgment in favor of Defendant-Appellee/Cross-Appellant Triangle Signs & Services, Inc. (Triangle), arguing, inter alia, that the district court's judgment is inconsistent with the verdict. Triangle cross-appeals the district court's denial of its request for statutory attorneys' fees. We affirm the take-nothing judgment in Triangle's favor and find no abuse of discretion in the district court's denial of Triangle's request for attorneys' fees. Nevertheless, we vacate the district court's determination that Southwest does not have a contract with either Infax, Inc. (INFAX) or the City of Houston. Our decision does not affect Triangle's duty to pay $17,115 in retainage to Southwest upon receipt of proper releases of Triangle and of lien rights against INFAX and the City of Houston. To the extent that our decision that the judgment calls for payment of $17,115 and not payment of $23,031 conflicts with the district court's judgment, we modify that judgment, and as modified, affirm.

I

FACTS AND PROCEEDINGS

Southwest subcontracted with Triangle to perform certain work at the International Arrivals Building at Intercontinental Airport in Houston. Triangle was itself a subcontractor of INFAX, the general contractor on the job for the Owner, the City of Houston.

Triangle and Southwest signed a written contract (the Subcontract Agreement). After work began, Southwest

performed work in addition to that specified in the Subcontract Agreement, pursuant to *written* change orders.[1] Southwest also performed work pursuant to *oral* change orders between Triangle and Southwest (the Oral Agreement).[2] Southwest claimed that it was entitled in the aggregate to almost $67,000 under both agreements. Triangle offered to pay Southwest $17,115,[3] conditioned on release of Southwest's liens against INFAX and the City of Houston, per the Written Agreement, but Southwest refused. After Triangle failed to pay retainage under the Written Agreement and all sums that Southwest deemed due on the alleged Oral Agreement, Southwest filed suit, alleging that Triangle had breached both agreements.

Throughout the trial, Triangle acknowledged that it had not paid the retainage and that it owed that amount under the Written Agreement. Triangle denied, however,

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[1] The Subcontract Agreement and written change orders will sometimes be referred to collectively as the Written Agreement.

[2] This fact was hotly contested at trial but was found in Southwest's favor by the jury. Triangle does not contest this finding on appeal.

[3] For ease of reference, we will sometimes refer to the $17,115 as the retainage due under the Written Agreement. Triangle contends on appeal that the $17,115 it offered to pay Triangle represents $8,008.64 for retainage and $9,106.36 for additional charges that Triangle had agreed to pay Southwest. This characterization is not important – the $17,115 is the amount Triangle admits it owed to Southwest under the *Written* Agreement, i.e., the Subcontract Agreement and Written Change Orders. The $17,115 does not include any damages resulting from breech of the Oral Agreement ($23,031), which Triangle apparently would have this court believe.

that it was in *breach* of that agreement, insisting that it was within its rights not to pay such sum until Southwest releases its lien rights against the City of Houston and INFAX as required by the Written Agreement. Moreover, as an affirmative defense in the alternative, Triangle claimed that if it were found to have breached the Written Agreement by failing to make that final payment, Triangle's breach was excused because Southwest had not yet released the liens.

Additionally, Triangle denied the existence of the Oral Agreement. And once again Triangle argued alternatively, as an affirmative defense, that if the Oral Agreement were found to have existed, performance was excused because Southwest failed to (1) obtain written change orders, (2) perform the changes in a good and workmanlike manner, and (3) timely bill for the work performed. Triangle also counterclaimed for declaratory relief, seeking determinations that it had not breached the Written Agreement and that the Oral Agreement did not exist, and seeking "other" relief to which Triangle would show just entitlement.

Pursuant to Federal Rule of Civil Procedure 49(a), the district court submitted the case to the jury by means of five special interrogatories. In response to those interrogatories, the jury found that (1) Triangle had not failed to pay Southwest in accordance with the Written Agreement, (2) Triangle orally agreed to pay Southwest for additional work not included in the Written Agreement, (3) Triangle failed to comply with the Oral Agreement by failing to pay Southwest for the work performed pursuant to the oral change orders, (4) Triangle's failure to comply with the Written "and/or" Oral Agreement to

pay is excused, and (5) $23,031 would fairly and reasonably compensate Southwest for Triangle's failure to pay under the terms of the Written and/or Oral Agreements.

Construing those answers, the court concluded that Triangle had not breached the Written Agreement and that, even though the Oral Agreement existed and Triangle had breached it, such breach of the Oral Agreement was excused. The court therefore rendered a "take-nothing" judgment against Southwest, assessed costs against Southwest, but denied Triangle's request for statutory attorneys' fees.

Triangle proposed findings of fact and conclusions of law on its counterclaim for declaratory relief, which the court adopted verbatim – three days *before* Southwest's response to those proposed findings and conclusions were due per court order. The court found specifically that Southwest did not have a contract with either the City of Houston or with INFAX. Further, the court concluded as a matter of law from its construction of the Subcontract Agreement that Triangle was not required to make final payment under the Written Agreement until and unless Southwest provided releases of lien rights against the City of Houston, and INFAX. The Court denied Triangle's request under the Texas Declaratory Judgment Act for statutory attorneys' fees.

Although the district court had preempted Southwest's opportunity to object to the proposed findings and conclusions, Southwest thereafter timely filed its objections, arguing that (1) the finding that Southwest had no contract with the City of Houston or INFAX was not supported by the evidence as it was neither pleaded nor

tried, and (2) Southwest should not be required to release lien rights against the City of Houston and INFAX because that conclusion of law (a) was not supported by Triangle's pleadings, (b) was not part of the court's instruction regarding payment of the money to Southwest, and (c) involves Southwest's rights against non-parties.

Southwest also timely appealed to this court, complaining of three errors relating to the judgment itself. First, Southwest contends that the answers to the five special interrogatories can only support a judgment in its favor. Alternatively, Southwest argues that if the answers cannot be reconciled to support a judgment in Southwest's favor, it is because the district court erroneously submitted Interrogatory No. 4, which asked two alternative questions, so that any response would be ambiguous.[4] As the answer is ambiguous, Southwest argues, such answer cannot support a judgment for either party, so reversal is mandated. Third, Southwest asserts that because the judgment required Triangle to pay the retainage to Southwest, the district court erred in rendering a take-nothing judgment against Southwest and deciding that Triangle was the prevailing party, awarding Triangle its costs.

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[4] Interrogatory No. 4 read:

> Do you find from a preponderance of the evidence that Defendant Triangle Signs & Services, Inc.'s failure, if any, to comply with the May 4, 1990 Subcontract Agreement, etc., *and/or* the oral agreement to pay for additional work are "excused"?

The jury responded, "Yes."

Southwest also asserts that the district court erred in finding that Southwest had no contract with the City of Houston or with INFAX, and erred in concluding that, under the Written Agreement, Southwest must release its lien rights against the City of Houston and INFAX before Triangle is required to pay the retainage. Finally, Southwest argues that the court failed to instruct the jury that Triangle had the burden of proof on its affirmative defense of excuse.

Triangle cross-appeals, arguing that the court abused its discretion in failing to award attorneys' fees to Triangle.

II

ANALYSIS

A. Take-Nothing Judgment is Consistent with Verdict

1. Reconciling Jury Answers

This court "should make all reasonable efforts to reconcile apparently inconsistent answers in a special verdict."[5] If the jury's answers are so ambiguous, or conflicting and inconsistent that we cannot reconcile the conflict, the special verdict will not support a judgment and must be reversed.[6]

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[5] *Martin v. Gulf States Utils. Co.*, 344 F.2d 34, 37 (5th Cir. 1965).

[6] *Royal Netherlands Steamship Co. v. Strachan Shipping Co.*, 362 F.2d 691, 694 (5th Cir. 1966), *cert. denied*, 385 U.S. 1004, 87 S. Ct. 708, 17 L. Ed. 2d 543 (1967).

Southwest's complaints about the judgment center around the district court's construction of the jury's answers to Interrogatory No. 4 (relating to the affirmative defense of excuse) and to Interrogatory No. 5 (relating to the quantum of damages). Southwest urges this court to construe the affirmative answer to No. 4, which asked whether Triangle's failure to pay under the Written *and/or* Oral Agreement was excused, to mean that breach of the Written Agreement, but not breach of the Oral Agreement, was excused. Otherwise, Southwest maintains, the jury's assessment of damages for *a* breach of contract in Interrogatory No. 5 would be rendered meaningless. We disagree.

Although the jury's assessment of $23,031 as the sum Southwest would need to recover to be made whole for breach of the Written *and/or* Oral Agreement (Interrogatory No. 5) may appear at first glance to be inconsistent with the jury's findings that Triangle's breach of the Written *and/or* Oral Agreement was excused (Interrogatory No. 4), examination of all the interrogatories – particularly in context with the so-called precatory instructions to Interrogatories Nos. 4 and 5 – reveals that the answers to Interrogatories Nos. 4 and 5 do not conflict irreconcilably.

INTERROGATORY NO. 1

> Do you find from a preponderance of the evidence that Defendant Triangle Signs & Services, Inc., failed to pay Plaintiff S.W.S. Erectors, Inc., d/b/a Southwest Signs, in accordance with the May 4, 1990 Subcontract Agreement, including the accompanying plans and written Change Orders?

NO

Interrogatory No. 1 inquires whether Triangle "failed to pay [Southwest] *in accordance with*"[7] *the Written* Agreement. Triangle had acknowledged early on and consistently that it was still withholding $17,115, admittedly owed to Southwest, pending Southwest's release of liens (required under that agreement). The negative response to Interrogatory No. 1 in effect states that Triangle's failure to pay the $17,000 retainage *was* in accordance with the contract. As such the negative answer to that interrogatory ends the entire inquiry regarding the Written Agreement, which, we reiterate, includes written change orders.

The defect in Southwest's proposed construction is that it ignores the jury's response to Interrogatory No. 1, by which the jury indicated that Triangle had *not* breached the Written Agreement, and its response to Interrogatories Nos. 2 and 3, finding that an Oral Agreement *did* exist and *was* breached by Triangle.[8]

INTERROGATORY NO. 2

> Do you find from a preponderance of the evidence that Defendant Triangle Sings & Services, Inc., agreed to pay for additional work

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[7] Emphasis added.

[8] Although Southwest is correct in asserting that Triangle admits that it had not paid the retainage, that admission does not mean that Triangle had breached the Written Agreement. It also does not convert the jury's no answer to Interrogatory No. 1 into a yes answer. Triangle never admitted that it had *failed to pay in accordance with the contract*; rather, Triangle contends that the contract did not yet require Triangle to make final payment.

> which was not included in the May 4, 1990 Subcontract Agreement, etc., and which was done pursuant to additional, oral Change Orders?
>
> YES

Interrogatory No. 2 deals solely with the existence vel non of an Oral Agreement (oral change orders between the parties). The "yes" answer tells the court that such a contract was found to exist. Having answered No. 2 affirmatively, the jury is instructed to answer Interrogatory No. 3.

INTERROGATORY NO. 3

> Do you find from a preponderance of the evidence that Defendant failed to comply with the agreement by failing to pay Plaintiff for the work performed on such additional, oral Change orders?
>
> YES

Interrogatory No. 3 questions whether Triangle's failure to pay Southwest for work performed under the *Oral* Agreement constituted a breach of ("failure to comply with") the Oral Agreement. The jury found that Triangle did breach the Oral Agreement.

Thus the stage is set for us, as it was for the jury, to focus on Interrogatory No. 4, relative to Triangle's affirmative defense of excuse, and precatory instruction to that interrogatory:

> If you have answered Interrogatory No. 1 "Yes", *or* Interrogatory Nos. 2 *and* 3 "Yes", then answer Interrogatory No. 4. Otherwise, do not answer Interrogatory No. 4.

INTERROGATORY NO. 4

> Do you find from a preponderance of the evidence that Defendant Triangle Signs & Services, Inc.'s failure, if any, to comply with the May 4, 1990 Subcontract Agreement, etc., and/or the oral agreement to pay for additional work are [sic] "excused"?
>
> YES

The instruction disjunctively conditions the need for the jury to proceed. The jury is first instructed that it should answer Interrogatory No. 4 only if it had answered "yes" to Interrogatory No. 1, which questioned whether Triangle had breached the Written Agreement. As Interrogatory No. 1 was answered in the negative, the jury was prohibited from answering No. 4 in any way related to the Written Agreement. In effect, the jury could not find a particular breach excused if it had already found that no breach had occurred. Thus any answer would, by definition, address the Oral Agreement.

The second alternative prerequisite to the jury's answering Interrogatory No. 4, on the other hand, deals exclusively with the Oral Agreement. And, both Interrogatories Nos. 2 *and* 3 must have been answered in the affirmative. As both were answered "yes," the jury had to answer Interrogatory No. 4, *but only as it pertains to the Oral Agreement*. The jury answered, "yes." Thus, when the first four interrogatories and their instructions are analyzed *in pari materia* as well as in sequence, the negative response to Interrogatory No. 1 and the affirmative responses to Nos. 2, 3, and 4, inform us that Triangle did not breach the Written Agreement, and that Triangle's breach of the existing Oral Agreement was excused. As

such, the jury determined that Southwest could take nothing from Triangle under either contract, albeit for diverse reasons.

Admittedly, this particular combination of jury answers to the first four interrogatories – finding no breach of the Written Agreement and excusing breach of the oral contract – should have been the end of the jury's inquiry. But the court's instruction preceding Interrogatory No. 5 did not allow the jury to forego answering Interrogatory No. 5:

> If you have answered Interrogatory No. 1 "Yes", *or* Interrogatories Nos. 2 *and* 3 "Yes", then answer the Interrogatory No. 5. Otherwise, do not answer Interrogatory No. 5.

The jury is initially instructed to answer Interrogatory No. 5 if it answered "yes" to Interrogatory No. 1. By clear implication, a response under that condition precedent must address the Written Agreement. As Interrogatory No. 1 was answered "no," however, the jury could not respond to Interrogatory No. 5 regarding the Written Agreement. Disjunctively, though, the jury is further instructed to answer No. 5 if it has answered both No. 2 and No. 3 affirmatively, which it had:

INTERROGATORY NO. 5

> What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Plaintiff S.W.S. Erectors, Inc. for its damages, if any, that resulted from failure, if any, of Defendant Triangle Signs & Services, Inc. to pay Plaintiff S.W.S. Erectors, Inc. in accordance with the Subcontract Agreement, etc., and/or the oral agreement to pay for additional work?

> Consider only the amount, if any, Triangle Sign & Service, Inc. agreed to pay S.W.S. Erectors, Inc. under the terms of the contract, or subsequent oral agreement. Do not consider other elements of damages, if any.
>
> Do not include any amount for interest on past damages, if any. $23,031

The jury dutifully proceeded to answer Interrogatory No. 5, but unquestionably in reference to the Oral Agreement only. The jury's answer, "$23,031," tells the court nothing more than that the amount of Southwest's loss resulting from Triangle's failure to comply with the *Oral* Agreement, by failing to pay Southwest for the work thereunder, was $23,031. But, as we know from the "yes" answer to No. 4, Triangle's failure to pay was excused, so the loss Southwest suffered is not legally recoverable from Triangle. As it turns out, then, the response of $23,031 to Interrogatory No. 5 is merely harmless surplusage.

Neither party objected to this instruction's failure to take into account the possibility that the jury might answer Interrogatory No. 4 the way it did. Neither party, then, may rely on the fact that the jury responded to No. 5 – as instructed – as creating a conflict where none existed. Our detailed, contextual analysis of the interrogatories and the instructions for answering them, and the jury's responses to those interrogatories, leads us inescapably to conclude that the verdict is susceptible of being construed consistently with the court's take-nothing judgment in favor of Triangle.

2. Ambiguous Question: Potential Ambiguity Cured

Southwest argues that the submission of an interrogatory that contained alternative questions was an abuse of discretion, and seeks reversal on that basis. Southwest contends that the alternative "and/or" language of Interrogatory No. 4 makes any response to that interrogatory – including the jury's "yes" answer – ambiguous.[9]

The framing and structure of special interrogatories are within the sound discretion of the district court.[10] We thus review special interrogatories for abuse of discretion.[11] Abuse of discretion is shown if the charge and interrogatories do not meet the *Dreiling* factors[12]:

(i) whether, when read as a whole and in conjunction with the general charge the interrogatories adequately presented the contested issues to the jury;

(ii) whether the submission of the issues to the jury was "fair;" and

(iii) whether the "ultimate questions of fact" were clearly submitted to the jury.[13]

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[9] Southwest timely and adequately objected to the district court's submission of Interrogatory No. 4 on these same grounds.

[10] *Dreiling v. General Elec. Co.*, 511 F.2d 768, 774 (5th Cir. 1975).

[11] *Id.*

[12] *Barton's Disposal Serv., Inc. v. Tiger Corp.*, 886 F.2d 1430, 1435 (5th Cir. 1989).

[13] *Id.*, quoting *Dreiling*, 511 F.2d at 774.

"An interrogatory encompassing two issues or issues in the alternative constitutes reversible error if the interrogatory is ambiguous *or* if one of the issues is incorrectly submitted to the jury."[14]

Southwest attempts to garner support for its position by referring to a finding by the Sixth Circuit that an interrogatory that incorporates two distinct theories of liability can be misleading to the jury.[15] Triangle responds that "[s]ubmitting potentially conflicting issues to a jury on alternative theories of recovery is not error because, until those issues are answered, no conflict can exist," citing *Cunningham v. Healthco, Inc.*[16] *Cunningham* did not specifically address ambiguity in interrogatories; it dealt instead with two separate jury interrogatories given on two conflicting theories or causes of action, whereby a recovery on one cause would conflict with recovery on the other. In contrast, the instant case involves a purported ambiguity in but a single interrogatory and does not involve conflicting theories of recovery. Consequently, examining the interrogatories for ambiguity (and thus for error) in the instant case – *after* they are answered – is sound: we decide whether the ambiguity materializes before reversing on that ground.

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[14] *Dougherty v. Continental Oil Co.*, 579 F.2d 954, 960 n.2 (5th Cir. 1978), *appeal dismissed per stipulation*, 591 F.2d 1206 (5th Cir. 1979) (citing *Prudential Ins. Co. v. Morrow*, 339 F.2d 411 (5th Cir. 1964), etc.).

[15] *Gootee v. Colt Indus., Inc.*, 712 F.2d 1057, 1066-67 (6th Cir. 1983).

[16] 824 F.2d 1448, 1465 (5th Cir. 1987) (using plain error standard of review).

Southwest argues that we cannot determine from the jury's affirmative answer to Interrogatory No. 4 whether Triangle was excused from complying with the Written Agreement or the Oral Agreement, or from complying with both. (We note here that Interrogatory No. 4 asks whether the *failure* to comply – not compliance – was excused.)

> Do you find from a preponderance of the evidence that [Triangle]'s failure, if any, to comply with the May 4, 1990 Subcontract Agreement, etc., *and/or* the oral agreement to pay for additional work are [sic] "excused"?

Triangle concedes that the interrogatory "potentially" asks two questions, but contends that the "if any" language of Interrogatory No. 4's "excuse" question, coupled with the language of the instruction to that interrogatory, pretermitted the potential ambiguity. This is so, Triangle asserts, because the jury was thereby instructed not to consider the Written Agreement if it answered Interrogatory No. 1 negatively. We agree.

Unfortunately for Southwest, we do not consider Interrogatory No. 4 and the jury's response to that interrogatory in a vacuum. Considered in light of the jury's responses to Interrogatories Nos. 1-3, Interrogatory No. 4 could only be asking whether Triangle's breach of the Oral Agreement was excused. Southwest's argument for reversal must fail – once Interrogatory No. 1 was answered in the negative, the potential ambiguity in Interrogatory No. 4 could never materialize.

Southwest's reliance on *Smith v. Southern Airways, Inc.*, 556 F.2d 1347 (5th Cir. 1977), is misplaced, as *Smith* is

easily distinguished. Judgment was rendered for the plaintiff in *Smith* after the jury returned a *general* verdict in favor of the plaintiff. The case had been submitted to the jury under three alternative theories of liability, one of which was without support in the evidence. As the court could not determine on which theory the jury found for the plaintiff – possibly the theory without support in the evidence – it reversed. That is a far cry from the situation we address here. For unlike the *Smith* court, we are able to determine easily which failure or "breach" was excused: the jury found that Triangle had breached only one of two contracts – the Oral Agreement. Consequently, we find no abuse of discretion in the submission of Interrogatory No. 4.

3. Award of Costs to Triangle

Southwest contends that, even if we do not construe the verdict in its favor, the district court erred in deciding that Triangle was the prevailing party and awarding Triangle its costs, as Triangle was still required to pay the retainage ($17,115) to Southwest. First, Southwest argues that inasmuch as Triangle had confessed liability to Southwest of $17,115, treating the judgment as favoring Triangle was erroneous. Second, Southwest insists that the $23,031 figure that was incorporated into the judgment *included* the $17,115 due under the Written Agreement. Southwest apparently believes that the court conditioned Triangle's payment of $23,031 – its damages for breach of the Oral Agreement – on Southwest's

release of liens. Southwest urges that it is actually entitled to $40,146 from Triangle (the sum of $23,031 and $17,115).

Triangle, hoping to avoid any additive treatment of the damages found for breach of the Oral Agreement and the amount judicially admitted as due under the Written Agreement, insists that $9,106.36 of the $17,115 represents an amount actually *admitted* to be due under the "requested change orders," which the jury would have included in the $23,031, its response to No. 5. In so insisting, though, Triangle would obscure the fact that the "requested change orders" for which it had admitted liability were *written*, and were part of the Written Agreement, not part of the Oral Agreement for which the jury assessed damages under No. 5.

The courts final judgment reads in pertinent part as follows:

> ORDERED, ADJUDGED and DECREED that [Southwest] take nothing of and from [Triangle] and that [Triangle] recover of [Southwest] its costs of action. It is, further,
>
> DECLARED that (1) the reasonable value of services and materials provided by [Southwest] above and beyond the amount paid to date is $23,031.00; and (2) [Triangle] is not required to make final payment to [Southwest] unless and until [Southwest] delivers to [Triangle] a release of [Triangle] and of lien rights against the City of Houston and Infax, Inc.

The judgment reveals the effect of the jury's verdict, as we have reconciled it, on Southwest's breach of contract claims – its only claims against Triangle. No breach was

found for which damages could be awarded; the only breach found by the jury was excused. The verdict thus supports the take-nothing judgment in favor of Triangle on Southwest's breach of contract claims. Thus, on Southwest's complaint Triangle is clearly the prevailing party.

The judgment also reflects the outcome of Triangle's declaratory judgment counterclaim. The declaration that Triangle had to make final payment to Southwest after Southwest released its lien rights is precisely the relief requested by *Triangle* in its counterclaim, and is consistent with Triangle's theory of the case as well. That result cannot be recast to prevent Triangle from achieving prevailing party status. As Triangle ultimately prevailed on the breach of contract claims, and also received a declaration on its counterclaim consistent with its theory of the case, the court's determination that Triangle was the prevailing party is not erroneous under any standard.

The court's assessment of costs against Southwest, then, is also proper. Pursuant to Federal Rule of Civil Procedure 54(d), the court allowed Triangle to recover its costs as the prevailing party. We could reverse the award of costs only if Southwest were able to show that the trial court abused its discretion.[17] As Southwest has not done so, we shall not disturb the award of costs.

4. *Quantum*

We pause here to clear up an obvious point of confusion. Although the final judgment does not express

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[17] *Sheets v. Yamaha Motors Corp.*, 891 F.2d 533, 539 (5th Cir. 1990).

whether its quantum is $17,115 or $23,031, the only rational construction is that Triangle must pay $17,115 to Southwest once the liens are released. The sum of $23,031 is the precise amount of damages Triangle would have had to pay Southwest for breach of the Oral Agreement if – but only if – the jury had not excused Triangle from paying. Thus, like the jury's answer to Interrogatory No. 5, the reference in the judgment to the sum of $23,031 is surplusage. To any extent that this construction of the district court's judgment might conflict with the actual judgment, our decision modifies the judgment to limit the principal amount due to Southwest from Triangle to $17,115, payable upon receipt of the proper releases of liens.[18]

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[18] Exhibit 25, on which the dissent relies to explain the jury's $23,031 response to Interrogatory No. 5, is neither self-explanatory nor relied upon by either of the parties. Exhibit 25 was not called to the attention of this court by either party, and nothing in the record indicates how "OT 5917" came to be pencilled-in on Exhibit 25 – whether by the parties, their counsel, the court, or the jury. Not even Southwest argues that *the jury* included the $17,115 in its response to Interrogatory No. 5. In fact, Southwest concedes in its brief that the sum of $23,031 is the precise amount of damages Triangle would have had to pay Southwest for an unexcused breach of the *Oral* Agreement. Southwest had asked this court to award both $23,031 (for breach of the Oral Agreement) and $17,115 (the amount due under the Written Agreement). But as the jury excused Triangle's breach of the Oral Agreement (Interrogatory No. 4), Southwest is simply not entitled to that $23,031 or any other sum. Even if we were to assume that the handwritten figures on Exhibit 25 somehow explained the jury's $23,031 answer to Interrogatory 5, we would conclude that the jury *erroneously* included the judicially admitted amount of $17,115, due under the Written Agreement, in its calculation of damages for the excused breach of the Oral Agreement.

B. Findings of Fact and Conclusions of law

Southwest complains of error in a finding of fact and a conclusion of law by the district court, which it adopted verbatim from Triangle's proposed findings and conclusions. The district court found that Southwest had no contract with either the City of Houston or INFAX. Southwest challenges this fact finding as clearly erroneous and unsupported by any evidence. The court also concluded as a matter of law that the express terms of the Subcontract Agreement required Southwest to release its liens against INFAX and the City of Houston before Triangle is required to make final payment. Southwest challenges this conclusion of law, arguing that it (a) was not supported by Triangle's pleadings, (b) was not part of the court's instruction regarding payment to Southwest, and (c) involves Southwest's rights against non-parties.[19]

We review the district court's legal conclusions de novo and its factual findings for clear error.[20] We will not set aside the court's factual findings unless, based upon the entire record, we are left with the definite and firm conviction that a mistake has been committed.[21]

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[19] Southwest asserts that the court is preventing Southwest from pursuing contract claims against non-parties that Triangle has to indemnify. Triangle points out that Southwest has already sued INFAX and intends to sue the City of Houston. Southwest contends that such evidence is outside the record and cannot be considered on appeal.

[20] *Missouri Pacific R.R. Co. v. Railroad Comm'n*, 948 F.2d 179, 181 (5th Cir. 1991) (citing FED. R. CIV. P. 52(a) and *Carr v. Alta Verde Indus., Inc.*, 931 F.2d 1055, 1058 (5th Cir. 1991)).

[21] *Id.*, 948 F.2d at 182.

1. *Finding of Fact*

Southwest is correct that the question whether a contract existed between Southwest and either INFAX or the City of Houston was not properly before the court and was not argued by either party. Triangle argues that Southwest presents no facts in its brief to refute the finding that Southwest has no contractual relations with either the City of Houston or INFAX – and further argues that the finding is entirely consistent with evidence that the City of Houston contracted with INFAX, INFAX subcontracted with Triangle, and Triangle subcontracted with Southwest. Even though that might be true, Triangle ignores the controlling fact that the matter simply was never put in issue: the finding may be *consistent* with the evidence, but it is not *supported* by the evidence. Triangle identifies no evidence to support the nonexistence of a contract, and Southwest represents that it was neither pleaded nor tried by the express or implied consent of the parties.

Although we find no error in this ruling as it affects the parties inter se, we are mindful of Southwest's concerns of issue or claim preclusion vis-a-vis the City of Houston and INFAX. We hold, therefore, that this finding by the district court does not affect the parties in this litigation, and certainly neither INFAX or the City of Houston. Neither will it have any effect beyond the bounds of this litigation, on these parties or those that are not before the court. The finding is without effect on other litigation between Southwest and the city of

Houston or INFAX, as to either issue or claim preclusion.[22]

2. Conclusion of Law

On the other hand, the district court did not err in concluding that Triangle is *not* required to make final payment until Southwest delivers a release of Triangle and a release of lien rights against the City of Houston and INFAX. Triangle had requested construction of the agreement, and the parties had disputed whether Triangle's failure to pay was excused due to Southwest's failure to provide the lien releases. Paragraph 9 of the Subcontract Agreement expressly and unambiguously makes the release of lien rights against both of those "non-parties" a condition precedent to Triangle's obligation to make final payment to Southwest. Southwest's arguments on this point must fail.

C. Instruction on Burden of Proof

The district court must instruct the jurors fully and correctly on the law applicable to the case.[23] The court

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[22] It appears Triangle inserted this "finding" in its proposed findings to assist the non-parties whom Southwest represents Triangle must indemnify if necessary. The record before us does not suggest that Triangle must indemnify INFAX or the City of Houston.

[23] *Crist v. Dickson Welding, Inc.*, 957 F.2d 1281, 1287 (5th Cir.), *cert. denied sub nom. Dickson Welding, Inc. v. Alexander & Alexander, Inc.*, ___ U.S. ___, 113 S. Ct. 187, 121 L. Ed. 2d 132 (1992).

has broad discretion in its instructions to the jury, and we employ a deferential standard in reviewing the jury charge and interrogatories.[24] "[S]o long as the jury is not misled, prejudiced, or confused, and the charge is comprehensive and fundamentally accurate, it will be deemed adequate and without reversible error."[25] We will reverse only when the charge as a whole leaves us with a "substantial and ineradicable doubt whether the jury has been properly guided in its deliberations."[26]

Southwest argues that the court failed to instruct the jury that Triangle had the burden of proof on Triangle's affirmative defense of excuse. Southwest maintains that the court's instruction to the jury – that the plaintiff in a civil case had the burden of proving its case by a preponderance of the evidence – placed the burden on Southwest to prove that Triangle's breach was *not* excused. The judge denied the instruction requested by Southwest, and Southwest contends that such denial was reversible error.

The most persuasive of Triangle's several bases for refuting this argument is simple and direct, i.e., that Interrogatory No. 4 does correctly place the burden of proof on Triangle. Again, we agree, finding that the plain language of Interrogatory No. 4 discredits Southwest's assertion that the burden of proof was misplaced:

> Do you find from a preponderance of the evidence that Defendant Triangle Signs & Services,

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[24] *Stine v. Marathon Oil Co.*, 976 F.2d 254, 259 (5th Cir. 1992).

[25] *Davis v. Avondale Indus., Inc.*, 975 F.2d 169, 174-75 (5th Cir. 1992).

[26] *Id.*, 975 F.2d at 175.

> Inc.'s failure, if any, to comply with the May 4, 1990 Subcontract Agreement, etc., and/or the oral agreement to pay for additional work are [sic] "excused"?

Albeit without employing the precise words, "burden of proof," the question clearly places the burden on Triangle to prove by a preponderance of the evidence that its failure, if any, was excused. To place the burden of proof on Southwest that the affirmative defense of excuse was *not* available, as Southwest contends that interrogatory did, it would have to read as follows:

> Do you find from a preponderance of the evidence that Defendant Triangle Signs & Services, Inc.'s failure, if any, do comply with the May 4, 1990 Subcontract Agreement, etc., and/or the oral agreement to pay for additional work is *not* "excused"?

The district court's placement of the burden of proof in a question, without an express instruction, did not mislead the jury. The district court did not abuse its discretion.

D. Cross-Appeal: Denial of Attorneys' Fees

Triangle cross-appeals, arguing that the district court abused its discretion in failing to award attorneys' fees to Triangle. Triangle's request for statutory attorneys' fees is not founded in federal law[27]; rather, this request is based

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[27] Attorneys' fees could not be awarded in this case under federal law. *See* 20 U.S.C. § 1290; *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 444 107 S. Ct. 2494, 2498, 96 L. Ed. 2d 385 (1987). We are to follow Texas law concerning the award or

on Texas Civil Practice & Remedies Code § 37.009 – a *discretionary* statute for award of attorneys' fees in a declaratory judgment action:

> In any proceeding under this chapter, the court *may* award costs and reasonable and necessary attorney's fees as are equitable and just.[28]

A clear showing of abuse of discretion is required to set aside a refusal to award attorneys' fees.[29] The test for abuse of discretion is whether the court acted without reference to any guiding rules and principles.[30] If each party has legitimate rights to pursue, there is no abuse of discretion in failing to award attorneys' fees.[31] Decisions *denying* attorneys' fees to the prevailing party have been upheld – as well as those which award attorneys' fees to the losing party.[32] Those decisions, however, "do not stand for the proposition that a trial court never abuses its discretion in declining to award attorneys' fees under a discretionary statute."[33]

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denial of attorneys' fees. *See Alyeska Pipeline Serv. Co. v. The Wilderness Society*, 421 U.S. 240, 259 n.31, 95 S. Ct. 1612, 44 L. Ed. 2d 141, 154 n.31 (1975).

[28] Emphasis added.

[29] *Oake v. Collin County*, 692 S.2d 454, 455 (Tex. 1985); *Edwin M. Jones Oil Co. v. Pend Oreille Oil & Gas Co.*, 794 S.W.2d 442, 448-49 (Tex. App. – Corpus Christi 1990, writ denied).

[30] *Lyco Acquisitions 1984 Ltd. Partnership v. First National Bank*, 860 S.W.2d 117, 121 (Tex. App. – Amarillo 1993, no writ).

[31] *United Interests, Inc. v. Brewington, Inc.*, 729 S.W.2d 897, 906 (Tex. App. – Houston 1987, writ ref'd n.r.e.).

[32] *Edwin M. Jones Oil Co.*, 794 S.W.2d at 448-49.

[33] *Lyco Acquisitions 1984*, 860 S.W.2d at 122.

Triangle cites no authority in its brief for its argument that the court abused its discretion, and points to no circumstances which render the denial of the request for attorneys' fees unjust. Triangle argues that it was entitled to attorneys' fees because it was caused by Southwest to incur "enormous expenses" with regard to claims against Triangle for which Triangle consistently denied liability for any amount over $17,115. True, the jury found for Triangle on the parties' dispute over the Written Agreement. But the jury also found for Southwest on the existence and breach of the Oral Agreement, two points which Triangle had strenuously contested. The jury also found that Southwest suffered damages in the amount of $23,031. Southwest notes too that Triangle has received $23,031 in services for which it is excused from paying under the judge's (and our) construction of the jury's answers. In fact, before the verdict was returned, the judge expressed a belief that the jury would return a verdict for Southwest, and expressed surprise at the opposite outcome. We conclude that both parties had legitimate legal rights to pursue: under these circumstances, no abuse of discretion has been shown.

III

CONCLUSION

For the foregoing reasons we affirm the district court's take-nothing judgment and its assessment of costs against Southwest. We vacate the holding that Southwest has no contract with either INFAX or the City of Houston, as that issue was not properly joined here, particularly as to the City of Houston and INFAX, which were never

parties to the litigation. We find no abuse of discretion in the district court's failure to award attorneys' fees to Triangle. We modify the judgment only to the extent necessary to remove any doubt that the amount Triangle must pay to Southwest is $17,115, rather than $23,031, conditioned on Southwest's release of Triangle from further liability and release of its liens against INFAX and the City of Houston. As modified, the judgment of the district court is AFFIRMED.

VAN GRAAFEILAND, Circuit Judge, dissenting:

This Court has been among the leaders in recognizing the value of Rule 49(a) special interrogatories in crystallizing jury findings that would exist only by implication in a general verdict. *See Weymouth v. Colorado Interstate Gas Co.*, 367 F.2d 84, 93 n.31 (5th Cir. 1966). Like other courts, however, we have recognized that the use of such interrogatories is not without its pitfalls. For the rule to operate as it should, each interrogatory must be clearly stated and confined to a single issue. 9 Wright & Miller, *Federal Practice and Procedure* § 2508. "Care should be taken to avoid questions that combine two issues disjunctively because a 'yes' or 'no' answer may be construed as referring to either issue." *Id.*

We have restated this admonition on a number of occasions. *See, e.g., R.B. Co. v. Aetna Ins. Co.*, 299 F.2d 753, 756 (5th Cir. 1962):

> The fact is that one of the sometimes unexpected, but wholesome, results of special interrogatories jury submission is to emphasize the absolute necessity that there be first a clear understanding of the precise legal issues for jury resolution and then a translation of them

> into articulate questions which may be authoritatively answered by a simple categorical.

See also Laguna Royalty Co. v. Marsh, 350 F.2d 817, 824 n.12 (5th Cir. 1965) (quoting *R.B. Co., supra*).

Interrogatories No. 4 and No. 5 in the instant case read, in pertinent part, as follows:

> Do you find from a preponderance of the evidence that Defendant Triangle Signs & Services, Inc.'s failure, if any, to comply with the May 4, 1990, Subcontract Agreement, etc., and/or the oral agreement to pay for additional work are "excused"?
>
> What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Plaintiff S.W.S. Erectors, Inc. for its damages, if any, that resulted from failure, if any, of Defendant Triangle Signs & Services, Inc. to pay S.W.S. Erectors, Inc. in accordance with the Subcontract Agreement, etc., and/or the oral agreement to pay for additional work?

These interrogatories are paradigmatic examples of the type of question that should not be asked. Triangle's attorney properly objected to their use, and his objection should have been upheld. The district court's failure to do so has resulted in a judgment that this dissenter is unable to justify rationally.

The manner in which the jury arrived at the damage figure of $23,031 can be deduced quite accurately from the record. Exhibit 25 in evidence is part of an exchange of correspondence between the parties. In typewritten letters and figures, this exhibit shows that $9,106.36 of the $23,031 figure represented the amount that Triangle had

expressed its willingness to pay because of "additional services provided on this project" by Southwest. A figure of $8,008.64, representing retainage admittedly owed but withheld pursuant to the contract terms, was added in pencil to the $9,106.36, making a total of $17,115. Immediately below this figure were the pencilled figures "OT 5917." Reference to other exhibits in evidence indicates clearly that the "OT" meant overtime. This amount was added to the $17,115, resulting in a total of $23,032. The jury's response to Interrogatory No. 5 was $23,031.

Had there been no special interrogatories and the $23,031 figure been handed down as a general verdict, the parties would not now be in our Court. They are here because the district court, over objection of counsel, submitted duplicitous and ambiguous interrogatories to the jury. For example, we cannot say whether the jury, in responding to Interrogatory No. 4, found that Triangle's "failure, if any, to comply with the May 4, 1990, Subcontract Agreement, etc., *and/or* the oral agreement to pay for additional work [was] 'excused.' " (Emphasis supplied). Likewise, we cannot say whether the jury, in responding to Interrogatory No. 5, awarded damages for Triangle's failure to pay Southwest "in accordance with the Subcontract Agreement, etc., *and/or* the oral agreement to pay for additional work." (Emphasis again supplied.) Moreover, we do not know whether the jury answered Interrogatories No. 4 and No. 5 in the same manner.

The uncertainty that inhered in these double-barreled interrogatories was exacerbated by the ambiguity in the parties' positions concerning whether the $17,115 should be included in the jury's verdict, an issue that the district

court deliberately avoided discussing. However, Triangle's counsel addressed the issue in his summation as follows:

> It's important in regard to the $17,000 that you do not punish my client for its honesty in owing this money. That $17,000 is really outside the scope of what you're being asked to consider today. It's owed under the contract; and once Southwest Signs complies with the contract by submitting that release, they're going to get paid. That money has always been on the table.

In *Royal Netherlands Steamship Co. v. Strachan Shipping Co.*, 362 F.2d 691, 694 (5th Cir. 1966), *cert. denied*, 385 U.S. 1004 (1967), we said that "[w]here the answers of the jury, upon which the court's judgment depends, are so ambiguous, or so conflicting and inconsistent that they cannot be reconciled, a special verdict will not support a judgment and the cause must be reversed for a new trial." *See also Prudential Ins. Co. v. Morrow*, 339 F.2d 411, 412-13 (5th Cir. 1964), and *Martin v. Gulf States Utilities Co.*, 344 F.2d 34, 37 (5th Cir. 1965). Because I believe that the only just and proper disposition we can make of the instant case is to remand it for retrial, I dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

S.W.S. ERECTORS, INC. d/b/a SOUTHWEST SIGNS	§	CIVIL ACTION NO. G-92-11
VS.	§	JURY DEMANDED
TRIANGLE SIGN & SERVICE, INC.	§	

FINAL JUDGMENT

(Filed Sept. 2, 1992)

This action came on for trial before the Court and a jury, Honorable Samuel B. Kent, United States District Judge presiding, commencing on August 12, 1992, and the jury having duly rendered its verdict, it is

ORDERED, ADJUDGED and DECREED that Plaintiff S.W.S. Erectors, Inc. take nothing of and from Defendant Triangle Sign & Service and that the Defendant Triangle Sign & Service recover of Plaintiff S.W.S. Erectors, Inc. its costs of action. It is, further,

DECLARED that (1) the reasonable value of services and materials provided by Plaintiff S.W.S. Erectors, Inc. above and beyond the amount paid to date to Plaintiff is $23,031.00; and (2) Defendant Triangle Sign & Service is not required to make final payment to Plaintiff S.W.S. Erectors, Inc. unless and until Plaintiff S.W.S. Erectors, Inc. delivers to Defendant Triangle Sign & Service a release of Defendant Triangle Sign & Service and of lien rights against the City of Houston and Infax, Inc.

For all of which let execution issue.

DATED at Galveston, Texas this 1st day of September , 1992.

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

S.W.S. ERECTORS, INC. d/b/a SOUTHWEST SIGNS	§	CIVIL ACTION NO. G-92-11
VS.	§	JURY DEMANDED
TRIANGLE SIGN & SERVICE, INC.	§	

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed Aug. 27, 1992)

COMES NOW Defendant Triangle Sign & Service and files this its Proposed Findings of Fact and Conclusions of Law in connection with Defendant's counter-claim for declaratory judgment.

FINDINGS OF FACT

1. The City of Houston contracted with Infax, Inc. to fabricate and install the dynamic and static signage for the International Airlines Building (IAB) at Houston Intercontinental Airport ("the Prime Contract").

2. Infax, Inc. subcontracted the static portion of the Prime Contract to Defendant Triangle Sign & Service.

3. Defendant Triangle Sign & Service subcontracted a portion of the work required under its contract dated May 4, 1990 with Infax, Inc. to Plaintiff S.W.S. Erectors, Inc. d/b/a Southwest Signs ("the Subcontract Agreement").

4. Plaintiff S.W.S. Erectors, Inc. did not have a contractual relationship with either the City of Houston or Infax, Inc. concerning the signage at IAB.

5. The reasonable value of the services and materials provided by Plaintiff S.W.S. Erectors, Inc. above and beyond the amount paid to date to Plaintiff S.W.S. Erectors, Inc. is $23,031.00.

CONCLUSIONS OF LAW

1. Defendant Triangle Sign & Service has judicially admitted that Plaintiff S.W.S. Erectors, Inc. is owed $17,115.00 for services and materials provided in connection with the signage at IAB.

2. Defendant Triangle Sign & Service is not required to pay the $17,115.00 to Plaintiff S.W.S. Erectors, Inc. unless and until Plaintiff S.W.S. Erectors, Inc. delivers to Defendant Triangle Sign & Service a release of Defendant Triangle Sign & Service and of lien rights against the City of Houston and Infax, Inc.

/s/ Samuel B. Kent
U.S. District Judge
9/1/92

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CERTIFICATE OF SERVICE

This is to certify that on the 27 day of August, 1992 a true and correct copy of the above and foregoing Proposed Findings of Fact and Conclusions of Law has been forwarded by U.S. Certified Mail, return receipt requested, to the following counsel:

Andrew A. Layman
One Riverway, Suite 2430
Houston, Texas 77056

/s/ Jeanne Sommerfeld
JEANNE SOMMERFELD

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

S.W.S. ERECTORS, INC. d/b/a SOUTHWEST SIGNS	§	CIVIL ACTION NO. G-92-11
V.	§	
TRIANGLE SIGN & SERVICE, INC.	§	

ORDER

(Filed Aug. 20, 1992)

Before the Court is S.W.S. Erectors, Inc.'s Motion to Reconstrue Jury's Findings. For the reasons herein briefly stated, the Motion is DENIED.

Plaintiff's suggestion that the jury's verdict, as regards Interrogatory No. 4 is ambiguous, and should result in the relief requested by Plaintiff, in its stated motion, is misplaced. It is uncontested that Defendant judicially admitted liability for $17,115.00, pursuant to applicable terms and provisions of the contract, and agreed work order changes. Given the judicial confession of such indebtedness, that amount was not in controversy, and that was noted repeatedly in the Record of these proceedings. The Court intentionally did not grant Defendant's Instruction in the Court's Charge to the Jury, to the effect of ignoring such amount, because the Court was afraid this in and of itself would create sufficient ambiguity that the jury would not understand how to resolve the case. However, to suggest that Plaintiff is

entitled to a recovery of $23,031.00, which was the finding of damages, over and above that amount, on the basis of the verdict findings in this case is, in the Court's view, not justified.

The $17,115.00 admittedly owed by Defendant is still owed by Defendant. This case did not effect that obligation. However, as regards any further allegedly contractual breaches, and consequential damages, pertaining thereto, the jury expressly found that any such contractual breach was excused, and therefore no indebtedness accrues to Defendant.

Similarly, in view of the exoneration of Defendant, Plaintiff's request for attorney's fees and expenses is misplaced and unjustified. Plaintiff is entitled to no recovery in this case, expressly once again noting that the obligation of Defendant to pay the judicially confessed liability of $17,115.00 in [sic] unaffected by this case.

For the foregoing reasons, Plaintiff's Motion is, in all things, DENIED.

IT IS SO ORDERED.

DONE at Galveston, Texas, this the 19 day of August, 1992.

/s/ Samuel B. Kent
SAMUEL B. KENT
United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

S.W.S. ERECTORS, INC.	§	CIVIL ACTION NO.
D/B/A SOUTHWEST SIGNS	§	G-92-11
	§	
V.	§	
	§	
TRIANGLE SIGN &	§	
SERVICE, INC.	§	

ORDER

(Filed Sept. 22, 1992)

Before the Court is Plaintiff's Motion to Reconsider Findings of Fact and Conclusions of Law and to Reconsider Final Judgment. The Court acknowledges that it would have been better to await the filing of Plaintiff's Response to Defendant's Proposed Findings of Fact and Conclusions of Law before entering findings and conclusions. The Court, however, has considered the motion and the record as a whole and finds that the arguments raised by Plaintiff's motion are without merit.

Therefore, it is hereby ORDERED, ADJUDGED, and DECREED that Plaintiff's Motion to Reconsider Findings of Fact and Conclusions of Law and to Reconsider Final Judgment is DENIED.

It is further ORDERED that the parties file no further pleadings in this action in this Court. The parties are instructed to seek any further relief they believe themselves entitled to in the United States Court of Appeals for the Fifth Circuit.

It is further ORDERED that each party bear its own taxable costs and attorney's fees.

IT IS SO ORDERED.

DONE at Galveston, Texas this 22nd day of September, 1992.

/s/ Samuel B. Kent
Samuel B. Kent
United States
District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7658

S.W.S. ERECTORS, INC., d/b/a SOUTHWEST SIGNS,

Plaintiff-Appellant
Cross-Appellee,

versus

TRIANGLE SIGN & SERVICE, INC.,

Defendant-Appellee
Cross-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING

(Filed May 27, 1994)

Before *VAN GRAAFEILAND, SMITH and WIENER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ Illegible
United States Circuit Judge

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* Senior Judge form the United States Court of Appeals for the Second Circuit, sitting by designation.